

EXHIBIT 1

THE HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,
Plaintiff,

vs.

MOTOROLA, INC., et al.,
Defendants.

MOTOROLA MOBILITY, INC., et al.,
Plaintiffs,

vs.

MICROSOFT CORPORATION,
Defendants.

Case No. C10-1823-JLR

**MICROSOFT'S MOTION TO
AMEND PROTECTIVE ORDER TO
ALLOW DESIGNATED IN-HOUSE
COUNSEL EXPANDED ACCESS TO
CONFIDENTIAL BUSINESS
INFORMATION**

**NOTE ON MOTION CALENDAR:
Friday, September 7, 2012**

I. INTRODUCTION

Microsoft respectfully requests an amendment to the Protective Order in this case (ECF No. 72) to allow T. Andrew Culbert and K. McNeill Taylor, Microsoft's and Motorola's respective in-house counsel who have been ordered to sign all pleadings and motions filed by

1 the parties, to have the same access to Confidential Business Information¹ as the parties'
2 outside counsel, subject to the same restrictions on use and disclosure.

3 Paragraph 3 of the Protective Order provides the parties' outside counsel, court
4 reporters, technical experts and the Court with unfettered access to all evidence. Paragraph 4
5 prohibits disclosure of Confidential Business Information, except as authorized, and requires
6 that any such information be used "solely for purposes of this action."

7 Paragraph 6 allows two in-house counsel for each party limited access to confidential
8 materials. Microsoft designated Culbert and David Killough as its designated representatives
9 subject to the Protective Order, and Motorola designated Tom Miller and Richard Wulff.
10 Protective Order, ¶ 6. Motorola did not designate Taylor.² These individuals are permitted
11 access to:

12 Confidential Business Information contained in responses to interrogatories,
13 answers to requests for admission, submissions to the Court, expert reports
14 (exclusive of exhibits and source code excerpts), opinions and orders of the
Court...

15 but are not permitted to view "Confidential Business Information pertaining to licensing or
16 other financial information..." *Id.* In practice, this restriction has meant that Motorola's
17 various submissions have required substantial redaction before they could be forwarded to
18 Culbert and Killough. Frequently, much of the substance has been lost in translation, impeding
19 their ability to assist in the preparation of Microsoft's case.

21 ¹ "Confidential Business Information" is defined in the current Protective Order as "information which has not
22 been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or
23 apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories,
amounts or source of any income, profits, losses, or expenditures." Protective Order Regarding the Disclosure
and Use of Discovery Materials (ECF No. 72), ¶1.

24 ² Under the operative Protective Order, Taylor is not permitted to review any document, including discovery
25 responses and expert reports, identified as containing "Confidential Business Information" under the Protective
Order, even in redacted form, because he was not designated as one of the Motorola in-house attorneys to whom
such access was granted.

1 By order dated January 24, 2012, the Court required that the parties each designate one
 2 in-house attorney to sign every substantive filing by the parties. Microsoft designated Culbert,
 3 and Motorola designated Taylor. By signing pleadings and motion papers, Culbert and Taylor
 4 have assumed the responsibilities set forth in Fed. R. Civ. P. 11 regarding the evidentiary
 5 support for the contentions made in the parties' respective submissions.

6 In order to fully discharge the responsibilities they assume by signing submissions,
 7 Culbert and Taylor need access to the relevant evidence underpinning the submission. For this
 8 reason, Microsoft respectfully requests that the Court amend the Protective Order to permit
 9 Culbert (and Taylor) to have the same access as outside counsel for the parties under Paragraph
 10 3 of the Protective Order.

11 **II. ARGUMENT**

12 **A. The Protective Order Should Be Amended to Allow Culbert and Taylor Access to** 13 **All Relevant Evidence.**

14 By order dated January 24, 2012, the Court required Culbert to sign each substantive
 15 filing by Microsoft. Taylor similarly was directed to sign Motorola's filings. Pursuant to Rule
 16 11, by signing pleadings, motions, or other papers to be submitted to the Court, counsel make
 17 certain representations, including that:

- 18 (3) the factual contentions have evidentiary support or, if specifically
 19 so identified, will likely have evidentiary support after a reasonable
 opportunity for further investigation or discovery; and
- 20 (4) the denials of factual contentions are warranted on the evidence or,
 21 if specifically so identified, are reasonably based on belief or a lack
 of information.

22 *Id.* As such, attorneys subject to the requirements of Rule 11 – whether in-house or outside
 23 counsel – must have access to all evidence supporting (or contradicting) the submissions to the
 24 Court which they sponsor so that they may comply with Rule 11's requirements.

1 While certain documents produced in discovery may contain the parties' confidential
 2 licensing information, the terms of the Protective Order are sufficient to protect the parties'
 3 business interests, even if Culbert and Taylor were treated as outside counsel. They will be
 4 permitted to disclose Confidential Business Information only to those persons specifically
 5 authorized by the Protective Order. Protective Order, ¶ 3. They will not be permitted to
 6 disclose this information to others at Microsoft or Motorola, or use this information for any
 7 purpose other than for this litigation – namely, to assist outside counsel in preparation for trial
 8 and remaining pre-trial motion practice.

9 On behalf of Microsoft, Culbert (along with Killough) has been intimately involved in
 10 all aspects of this case. He is counsel of record and an integral part of Microsoft's litigation
 11 team. He has executed Attachment A to the Protective Order, signifying his agreement to use
 12 confidential business information only for purposes of this litigation and not to use or disclose
 13 any Motorola or third-party confidential business information except as authorized. There is
 14 no reason to believe that allowing full access to the evidence in this case would lead to a
 15 violation of these commitments.

16 One result of the current application of the Protective Order is heavy redaction of both
 17 parties' expert reports before they can be given to Culbert. This part of the "evidence"
 18 assumes increasing importance as immediate pretrial motions are prepared related to those
 19 expert reports.

20 For this and other reasons, the Protective Order should be amended to permit, at
 21 minimum, Culbert (and Taylor for Motorola) to have the same access to the evidence as
 22 outside counsel for the parties.

23 **B. The Requested Amendments Will Not Cause Any Undue Prejudice.**

24 Motorola cannot realistically claim it would be prejudiced by the proposed amendments
 25 to the Protective Order. While Microsoft recognizes that certain documents produced in

1 discovery may contain the parties' confidential licensing or financial information, the amended
 2 Protective Order still would sufficiently protect the parties' business interests. Culbert and
 3 Taylor would be permitted to disclose Confidential Business Information only as authorized by
 4 the Protective Order. They would not be permitted to disclose this information to others at
 5 Microsoft or Motorola, or use this information for any purpose other than for this litigation.
 6 The evidence would be used to assist outside counsel in preparation for trial and remaining
 7 pre-trial motion practice.

8 Further, the Protective Order already contemplates that, under certain circumstances,
 9 even the parties' most sensitive confidential business information can be disclosed to those in-
 10 house attorneys specifically identified in the Protective Order – Culbert, Killough, Miller and
 11 Wulff. The Protective Order provides that these designated in-house counsel “*shall not be*
 12 *excluded from any confidential portion of the trial or other in-Court proceedings in this case.*”
 13 *Id.*, ¶ 7 (emphasis supplied). Thus, Culbert, Killough, Miller and Wulff may remain in the
 14 Courtroom during any argument or presentation concerning the terms of the parties' licensing
 15 agreements with third parties, financial information, or any other confidential matters.
 16 Allowing Culbert and Taylor access to this same material when it appears in pre-trial papers
 17 discloses substantively no more than the parties already have agreed may be disclosed in the
 18 courtroom to the in-house counsel identified in the Protective Order. Any third party who had
 19 provided documents subject to the Protective Order was similarly apprised of such courtroom
 20 access.

21 Culbert regularly has been in the courtroom when outside counsel debated the details of
 22 confidential evidence – details he was hearing for the first time. Culbert should be permitted
 23 not only to *hear* presentations about confidential evidence, but also to help *develop* them. This
 24 is especially true given that many of these arguments are based on evidence cited in briefs he
 25 signed as counsel of record for Microsoft.

1 The requested amendments to the Protective Order will allow the parties to more
 2 efficiently and effectively prepare for the RAND trial and will provide Culbert with full
 3 information regarding the issues underlying impending motions in limine and *Daubert*
 4 motions. Treating all counsel who sign pleadings and motions the same (i.e. as outside
 5 counsel) would simplify the parties' preparation and presentation of their cases immensely,
 6 while still maintaining appropriate safeguards against improper use or disclosure of
 7 confidential material.

8 **III. CONCLUSION**

9 For the reasons set forth herein, Microsoft respectfully requests that the Court amend
 10 the Protective Order. A proposed amended Protective Order is attached hereto as Exhibit A. A
 11 red-lined version showing the proposed amendments is attached hereto as Exhibit B.

12 DATED this 30th day of August, 2012.

13 CALFO HARRIGAN LEYH & EAKES LLP

14
 15 By /s/ Arthur W. Harrigan, Jr.
 16 Arthur W. Harrigan, Jr., WSBA #1751
 17 Christopher Wion, WSBA #33207
 18 Shane P. Cramer, WSBA #35099

19 By /s/ T. Andrew Culbert
 20 T. Andrew Culbert
 21 David E. Killough
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 23 1 Microsoft Way
 24 Redmond, WA 98052
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Counsel for Microsoft Corp.

CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 30th day of August, 2012, I caused the preceding document to be served on counsel of record in the following manner:

Attorneys for Motorola Solutions, Inc., and Motorola Mobility, Inc.:

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DATED this 30th day of August, 2012.

s/ Linda Bledsoe
LINDA BLEDSOE

EXHIBIT A

HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,
Plaintiff,

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MOTOROLA, INC., et al.,
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MOTOROLA MOBILITY, INC., et al.,
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vs.

MICROSOFT CORPORATION,
Defendants.

Case No. C10-1823-JLR

**AMENDED PROTECTIVE ORDER
REGARDING THE DISCLOSURE
AND USE OF DISCOVERY
MATERIALS**

Microsoft Corporation (“Microsoft”) and Motorola, Inc., Motorola Mobility, Inc., and General Instrument Corporation (collectively “Motorola”) hereby stipulate that this protective order should be entered and will govern the conduct of discovery in this case.

1. Confidential Business Information is information which has not been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of

1 customers, inventories, amount or source of any income, profits, losses, or expenditures of any
2 person, firm, partnership, corporation, or other organization, the disclosure of which
3 information is likely to have the effect of causing substantial harm to the competitive position
4 of the person, firm, partnership, corporation, or other organization from which the information
5 was obtained, unless the Court is required by law to disclose such information.

6 2. (a) Any information submitted in pre-trial discovery or in a pleading,
7 motion, or response to a motion in this action, either voluntarily or pursuant to order, and
8 which is asserted by a supplier to contain or constitute Confidential Business Information shall
9 be so designated by such supplier in writing, or orally at a deposition, conference, or hearing,
10 and shall be segregated from other information being submitted. Documents shall be clearly
11 and prominently marked on their face with the legend: “[SUPPLIER’S NAME]
12 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER” or a
13 comparable notice. During the pre-trial phase of this action, such information, whether
14 submitted in writing or in oral testimony, shall be disclosed only *in camera* before the Court
15 and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules of the United
16 States District Court for the Western District of Washington.

17 (b) The Court may determine that information alleged to be confidential is
18 not confidential, or that its disclosure is necessary for the proper disposition of the proceeding
19 before, during, or after the close of the action herein. If such a determination is made by the
20 Court, opportunity shall be provided to the supplier of such information to argue its
21 confidentiality prior to the time of such ruling.

22 3. In the absence of written permission from the supplier or an order from the
23 Court, any confidential documents or business information submitted in accordance with the
24 provisions of paragraph 2 above shall not be disclosed to any person other than:
25

1 (i) outside counsel for parties to this action, including necessary secretarial
2 and support personnel assisting such counsel;

3 (ii) qualified persons taking testimony involving such documents or
4 information and necessary stenographic and clerical personnel thereof;

5 (iii) technical experts and their staff who are employed for the purposes of
6 this litigation;

7 (iv) T. Andrew Culbert (for Microsoft) and K. McNeill Taylor (for
8 Motorola); and

9 (v) the Court.

10 4. Confidential Business Information submitted in accordance with the provisions
11 of paragraph 2 above shall not be made available to any person designated in paragraphs 3(iii)-
12 (iv) unless he or she shall have first read this order and shall have signed a writing substantially
13 provided as Attachment A hereto, a copy of which shall be provided to both parties,
14 manifesting agreement:

15 (i) to be bound by the terms thereof;

16 (ii) not to reveal such Confidential Business Information to anyone other
17 than another person designated in paragraph 3; and

18 (iii) to utilize such Confidential Business Information solely for purposes of
19 this action.

20 5. If the Court orders, or if the supplier and all parties to the action agree, that
21 access to or dissemination of information submitted as Confidential Business Information shall
22 be made to persons not included in paragraph 3 above, such matter shall only be accessible to
23 or disseminated to such persons based upon the conditions pertaining to, and obligations
24 arising from this order, and such persons shall be considered subject to it, unless the Court
25

1 finds that the information is not Confidential Business Information as defined in paragraph 1
2 hereof.

3 6. In addition to the persons included in paragraph 3 above, Confidential Business
4 Information contained in responses to interrogatories, answers to requests for admission,
5 submissions to the Court, expert reports (exclusive of exhibits and source code excerpts),
6 opinions and orders of the Court may be accessible to or disseminated to the following two in-
7 house counsel, who are members of at least one state bar in good standing, with direct
8 responsibility for managing this litigation:

9 (a) for Motorola, Tom Miller and Richard A. Wulff;

10 (b) for Microsoft, David E. Killough.

11 provided that (1) Confidential Business Information pertaining to licensing or other
12 commercially sensitive financial information shall not be made available under this paragraph
13 6 to such designated in-house counsel; the supplier shall designate such Confidential Business
14 Information pertaining to licensing or other commercially sensitive financial information as
15 “[SUPPLIER’S NAME] CONFIDENTIAL FINANCIAL INFORMATION – OUTSIDE
16 ATTORNEYS’ EYES ONLY – SUBJECT TO PROTECTIVE ORDER” and promptly provide
17 a redacted version of such document that may be disseminated to the in-house counsel
18 designated under this paragraph 6; and (2) such in-house counsel shall have first read this order
19 and shall have signed a writing substantially provided as Attachment A hereto, a copy of which
20 shall be provided to both parties, manifesting agreement:

21 (i) to be bound by the terms thereof;

22 (ii) not to reveal such Confidential Business Information to anyone other
23 than another person designated in paragraph 3; and

24 (iii) to utilize such Confidential Business Information solely for purposes of
25 this action.

1 7. Subject to the restrictions of paragraph 6 above, the two in-house counsel
2 designated therein shall not be excluded from any confidential portion of the trial or other in-
3 Court proceedings in this case.

4 8. Any Confidential Business Information submitted to the Court in connection
5 with a motion or other proceeding within the purview of this action shall be submitted under
6 seal pursuant to paragraph 2 above. Any portion of a transcript in connection with this action
7 containing any Confidential Business Information submitted pursuant to paragraph 2 above
8 shall be bound separately and filed under seal. When any Confidential Business Information
9 submitted in accordance with paragraph 2 above is included in an authorized transcript of a
10 deposition or exhibits thereto, arrangements shall be made with the court reporter taking the
11 deposition to bind such confidential portions and separately label them [SUPPLIER'S NAME],
12 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER.

13 Before a court reporter receives any such information, he or she shall have first read this order
14 and shall have agreed in writing to be bound by the terms thereof. Alternatively, he or she
15 shall sign the agreement included as Attachment B hereto. Copies of each such signed
16 agreement shall be provided to the supplier of such Confidential Business Information.

17 9. The restrictions upon, and obligations accruing to, persons who become subject
18 to this order shall not apply to any information submitted in accordance with paragraph 2
19 above to which the person asserting the confidential status thereof agrees in writing, or the
20 Court rules after an opportunity for hearing, that the information was publicly known at the
21 time it was supplied to the receiving party or has since become publicly known through no
22 fault of the receiving party.

23 10. If while this action is before the Court, a party to this order who is to be a
24 recipient of any business information designated as confidential and submitted in accordance
25 with paragraph 2 disagrees with respect to such a designation, in full or in part, it shall notify

1 the supplier in writing and they will thereupon confer as to the status of the subject information
2 proffered within the context of this order. If prior to or at the time of such a conference, the
3 supplier withdraws its designation of such information as being subject to this order, but
4 nonetheless submits such information for purposes of the action, such supplier shall express the
5 withdrawal in writing, and serve such withdrawal upon all parties. If the recipient and supplier
6 are unable to concur upon the status of the subject information submitted as Confidential
7 Business Information within ten days from the date of notification of such disagreement, any
8 party to this order may raise the issue of the designation of such a status to the Court who will
9 rule upon the matter. The Court may *sua sponte* question the designation of the confidential
10 status of any information and, after opportunity for hearing, may remove the confidentiality
11 designation.

12 11. No less than 10 days (or any other period of time designated by the Court) prior
13 to the initial disclosure to a proposed expert of any confidential information submitted in
14 accordance with paragraph 2, the party proposing to use such expert shall submit in writing the
15 name of such proposed expert and his or her educational and employment history to the
16 supplier. If the supplier objects to the disclosure of such Confidential Business Information to
17 such proposed expert as inconsistent with the language or intent of this order or on other
18 grounds, it shall notify the recipient in writing of its objection and the grounds therefor prior to
19 the initial disclosure. If the dispute is not resolved on an informal basis within ten days of
20 receipt of such notice of objection, the supplier shall submit immediately each objection to the
21 Court for a ruling. The submission of such Confidential Business Information to such
22 proposed expert shall be withheld pending the ruling of the Court.

23 12. If Confidential Business Information submitted in accordance with paragraph 2
24 is disclosed to any person other than in the manner authorized by this protective order, the
25 party responsible for the disclosure must immediately bring all pertinent facts relating to such

1 disclosure to the attention of the supplier and the Court and, without prejudice to other rights
2 and remedies of the supplier, make every effort to prevent further disclosure by it or by the
3 person who was the recipient of such information.

4 13. Nothing in this order shall abridge the right of any person to seek judicial
5 review or to pursue other appropriate judicial action with respect to any ruling made by the
6 Court concerning the issue of the status of Confidential Business Information.

7 14. Upon final termination of this action, each party that is subject to this order
8 shall assemble and return to the supplier all items containing Confidential Business
9 Information submitted in accordance with paragraph 2 above, including all copies of such
10 matter which may have been made. Alternatively, the parties subject to this order may, with
11 the written consent of the supplier, destroy all items containing Confidential Business
12 Information and certify to the supplier (or his counsel) that such destruction has taken place.

13 15. If any Confidential Business Information which is supplied in accordance with
14 paragraph 2 above is supplied by a nonparty to this action, such a nonparty shall be considered
15 a "supplier" as that term is used in the context of this order.

16 16. Each nonparty supplier shall be provided a copy of this order by the party
17 seeking information from said supplier.

18 17. The inadvertent production of any document or information (whether
19 designated as Confidential Business Information or not) shall not be deemed to waive any
20 attorney-client privilege, work product protection, or other privilege or immunity that would
21 otherwise attach to the document or information produced, or to other documents or
22 information, so long as the procedures of paragraphs 18 and 19 below are followed.

23 18. If a producing party or person discovers that a privileged, protected, or
24 otherwise immune document or information has been produced, the party or person must,
25 promptly after discovery, notify all other party or parties of the claim of privilege or other

1 protection or immunity. Upon such notice, each other party shall use its best efforts to retrieve
2 the original and all copies of the identified document or information of which the party is
3 aware, shall promptly destroy all such copies of the identified document or information, and
4 shall notify the producing party in writing that it has done so within ten (10) calendar days of
5 receiving such notice. Such destruction shall not constitute an acknowledgement that the
6 identified document or information is, in fact, privileged or entitled to protection or immunity
7 and shall not preclude any party from later moving the Court to compel the production of the
8 identified document or information. Within a reasonable time after notifying the other party or
9 parties of a claim of privilege or other protection or immunity, the Producing Party shall
10 provide a privilege log for those materials.

11 19. If a receiving party receives any document or information that appears to be
12 subject to an attorney-client privilege, work product protection, or other privilege or immunity
13 that would otherwise attach to the document or information, and where it is reasonably
14 apparent that the document or information was provided or made available through
15 inadvertence, the receiving party must refrain from examining the document or information
16 any more than is essential to ascertain whether the document or information is likely
17 privileged, protected, or otherwise immune, and shall immediately notify the producing party
18 in writing that the receiving party possesses material that appears to be privileged, protected, or
19 otherwise immune. The procedures of paragraph 18 shall then apply.

20 20. The parties have agreed to follow the provisions of Fed. R. Civ. P. 26(b)(4)(B)-
21 (D), as amended effective December 1, 2010, with respect to the protection of draft expert
22 reports and communications between a party's attorney(s) and an expert(s). In addition, the
23 parties have agreed that notes taken by the parties' experts in the course of the preparation of
24 their reports, drafts of the expert reports, and all communications between counsel for the
25 parties and their experts (including, but not limited to, emails and other written

1 correspondence) (all of the foregoing hereinafter referred to as “Expert Work Product”) need
2 not be retained and shall be not produced in this or any other action. Expert Work Product
3 shall not include communications, information and things that are relied upon by the expert in
4 his or her opinions, or which otherwise form the basis of the expert’s report. Neither the terms
5 of this paragraph nor the parties’ agreement to them implies that any of the information
6 restricted from discovery in this paragraph would otherwise be discoverable.

7 21. Confidential Source Code shall mean human-readable programming language
8 text that defines software, firmware, or electronic hardware descriptions. Confidential Source
9 Code includes, without limitation, computer code; scripts; assembly; object code; source code
10 listings and descriptions of source code; object code listings and descriptions of object code;
11 Hardware Description Language (HDL); Register Transfer Level (RTL) files that describe the
12 hardware design of any ASIC or other chip; similarly sensitive implementation details; files
13 containing text written in “C,” “C++,” assembler, VHDL, Verilog, and digital signal processor
14 (DSP) programming languages; “.include files;” “make” files; link files; and other human-
15 readable text files used in the generation and/or building of software directly executed on a
16 microprocessor, microcontroller, or DSP. Confidential Source Code is a form of, and shall be
17 afforded all of the same protections as, Confidential Business Information as defined in
18 paragraph 1 hereto unless otherwise provided in paragraphs 21 to 26. The restrictions herein
19 on Confidential Source Code do not apply to publicly-available source code available as open
20 source code.

21 22. To the extent that a party wishes to obtain access to Confidential Source Code,
22 the following procedures may apply at the option of the supplier. Nothing in this Order shall
23 be construed as a representation or admission by a party that Confidential Source Code is
24 properly discoverable in this action, or to obligate any party to produce Confidential Source
25 Code.

1 23. Documents or things that comprise a party's confidential, proprietary and/or
2 trade secret source code or object code may be designated CONFIDENTIAL SOURCE CODE.
3 Documents or things that include or are accompanied by confidential, proprietary and/or trade
4 secret source code or object code may be designated CONFIDENTIAL SOURCE CODE only
5 if such confidential, proprietary and/or trade secret source code or object code cannot
6 reasonably be segregated from the document or thing. The following conditions shall govern
7 the production, review and use of documents or things designated CONFIDENTIAL SOURCE
8 CODE.

9 24. All information designated as CONFIDENTIAL SOURCE CODE shall be
10 subject to the following provisions:

11 (i) Subject to the following notice provisions and each producing party's
12 written objections, each producing party shall make its responsive CONFIDENTIAL
13 SOURCE CODE continuously available for inspection during discovery and through
14 the conclusion of the trial in this action. Any single reviewing session (conducted
15 during one business day or during consecutive business days of review) shall be
16 conducted during regular business hours (9:00 A.M. to 6:00 P.M. local time) on four
17 (4) calendar days' written (including email) notice, or during such other hours as may
18 be mutually and reasonably agreed upon on reasonable notice.

19 (ii) A list of names of persons who will view the source code will be
20 provided to the producing party in conjunction with the written notice requesting
21 inspection. The receiving party shall maintain a daily log of the names of persons who
22 enter the source code viewing room (see paragraph 24(iv) below) to view the source
23 code and note on the log when these persons enter and depart. The producing party
24 shall be entitled to have a person observe all entrances and exits from the source code
25

1 viewing room, and to receive a copy of the log, but shall not otherwise be entitled to
2 observe the receiving party's inspection.

3 (iii) All source code produced pursuant to these provisions will be made
4 available by the producing party at the following locations:

- 5 • By Motorola, at the offices of Ropes & Gray LLP, 111 South Wacker Drive,
46th Floor, Chicago, Illinois 60606;
- 6 • By Microsoft, at the offices of Sidley Austin LLP, 1501 K Street NW,
7 Washington, DC 20005; and
- 8 • By third parties, at such location(s) as may be mutually agreed to by the
producing third party and the requesting party, or as otherwise ordered by the
9 Court.

10 (iv) All source code will be made available in a private room, on a secured
11 computer without Internet access or network access to other computers, as necessary
12 and appropriate to prevent and protect against any unauthorized copying, transmission,
13 removal, or other transfer of any source code outside or away from the computer on
14 which the source code is provided for inspection (the "Source Code Computer"). The
15 producing party shall be obligated to install such reasonable tools or programs
16 necessary to review and search the code produced on the platform produced, as
17 specified by the receiving party, which the receiving party may provide if the producing
18 party does not have. For example, prior to the date of the inspection, a text editor or
19 IDE capable of performing syntax highlighting should be installed on the Source Code
20 Computer. The producing party shall not be obligated to install tools or programs
21 capable of compiling and running source code. To the extent the receiving party
22 provides the producing party with tools or programs to install for use during a
23 reviewing session, any such tools or programs must be provided no later than five (5)
24 business days in advance of the first reviewing session for which such installation is
25 desired. Thereafter, such tools or programs shall remain on the Source Code Computer
throughout the discovery period, absent agreement to the contrary.

1 (v) The receiving party's outside counsel and/or technical advisers shall be
2 entitled to take notes relating to the source code but may not copy the source code into
3 the notes. Such notes shall be subject to the provisions of paragraph 24(x) below. No
4 copies of all or any portion of the source code may leave the room in which the source
5 code is inspected. Furthermore, no other written or electronic record of the source code
6 is permitted except as otherwise provided herein.

7 (vi) During inspection of the code, the receiving party may compile a list of
8 source code files to be produced. The receiving party will only identify such files as
9 are reasonably necessary to facilitate the receiving party's preparation of the case,
10 including (1) when reasonably necessary to prepare any filing with the Court or to serve
11 any pleadings or other papers on any other party, (2) to prepare internal attorney work
12 product materials, (3) or to prepare other necessary case materials such as testifying
13 expert reports, consulting expert written analyses, and related drafts and
14 correspondences. In no event may the receiving party identify more than those files
15 necessary to analyze the issues in this case during the duration of the case without prior
16 written approval by the producing party. Upon identification of such files by the
17 receiving party, the producing party shall print, append production numbers to, and
18 label such files with the file's complete file path (*e.g.*, ./product1/source/main/
19 test/test.h) and the designation CONFIDENTIAL SOURCE CODE. If the producing
20 party objects that identified files are not reasonably necessary to any case preparation
21 activity, the producing party shall make such objection known to the receiving party
22 within five (5) business days of the identification of any files by the receiving party. If,
23 after meeting and conferring, the producing party and the receiving party cannot
24 resolve the objection, the producing party shall be entitled to seek a judicial resolution
25 of whether or not the identified source code in question is reasonably necessary to any

1 case preparation activity. In the absence of any objection, or upon resolution of any
2 such dispute by the Court, the producing party shall provide one printed copy of the
3 identified files to the receiving party within five (5) business days of the identification
4 of such files by the receiving party or, if applicable, resolution of a dispute by the
5 Court. The printed pages shall constitute part of the source code produced by the
6 producing party in this action.

7 (vii) Unless otherwise agreed in advance by the parties in writing, following
8 each reviewing session (conducted during one business day or during consecutive
9 business days of review), the receiving party's outside counsel and/or technical advisers
10 shall remove all notes, documents, laptops, and all other materials from the room that
11 may contain work product and/or attorney-client privileged information. The
12 producing party shall not be responsible for any items left in the room following each
13 inspection session.

14 (viii) The receiving party will not copy, remove, or otherwise transfer any
15 source code from the Source Code Computer including, without limitation, copying,
16 removing, or transferring the source code onto any other computers or peripheral
17 equipment. The receiving party will not transmit any source code in any way from the
18 producing party's facilities or the offices of its outside counsel of record.

19 (ix) Documents designated CONFIDENTIAL SOURCE CODE may only be
20 viewed by or disclosed to outside counsel or the receiving party's technical advisers
21 approved by the producing party and their necessary support personnel. The term
22 "technical adviser" shall mean an independent, outside expert witness or consultant
23 with whom counsel may deem it appropriate to consult, subject to the following
24 provision. Documents designated CONFIDENTIAL SOURCE CODE may not be
25 disclosed to in-house counsel.

1 (x) A party desiring to disclose information to a technical adviser shall give
2 prior written notice to the producing party or non-party, who shall have ten (10)
3 business days after such notice is given to object in writing. A party desiring to
4 disclose CONFIDENTIAL SOURCE CODE information to a technical adviser must
5 provide the following information for each technical adviser: (i) name, address,
6 curriculum vitae, current employer, and employment (including consulting) history for
7 the past four (4) years; and (ii) a listing of cases in which the witness has testified as an
8 expert at trial or by deposition within the preceding four years. No CONFIDENTIAL
9 SOURCE CODE information shall be disclosed to such expert(s) or consultant(s) until
10 after the expiration of the foregoing notice period.

11 (xi) The outside counsel and technical advisers (who have been approved to
12 access source code under paragraphs 24(ix) and 24(x) above) for a receiving party shall
13 maintain and store any paper copies of the source code or notes related to such source
14 code (as referenced in paragraphs 24(v) and 24(vi)) at their offices in a manner that
15 prevents duplication of or unauthorized access to the source code or notes, including,
16 without limitation, storing the source code or notes in a locked room or cabinet at all
17 times when those materials are not in use;

18 (xii) The receiving party's outside counsel of record may make no more than
19 five additional paper copies of any portions of the source code files identified pursuant
20 to paragraph 24(vi), not including copies attached to court filings, and shall maintain a
21 log of all copies of the source code (received from a producing party) that are provided
22 by the receiving party to any qualified person. The log shall include the names of the
23 recipients and reviewers of copies and locations where the copies are stored. Any
24 paper copies of source code shall be designated CONFIDENTIAL SOURCE CODE –
25 and shall be stored or viewed only at (1) the offices of outside counsel for the receiving

1 party, (2) the offices of technical advisers who have been approved to access source
 2 code under paragraphs 24(ix) and 24(x), (3) the site where any deposition is taken,
 3 (4) the Court, or (5) any intermediate location necessary to transport the information to
 4 a hearing, trial, or deposition. Any such paper copies shall be maintained at all times in
 5 a locked and secure location. The producing party shall not unreasonably deny a
 6 receiving party's request to make (and log) additional copies, providing that the request
 7 is for good cause and for use that otherwise complies with this order. The producing
 8 party shall be entitled to a copy of the log upon request, and at the conclusion of the
 9 litigation.

10 (xiii) The receiving party may include excerpts of source code in a pleading,
 11 exhibit, expert report, discovery document, deposition transcript, other Court document,
 12 or any drafts of these documents ("Source Code Documents"). The receiving party
 13 shall only include such excerpts as are reasonably necessary for the purposes for which
 14 such part of the source code is used — as an example, excerpts of approximately 25 to
 15 40 lines in length are presumptively reasonable.

16 (xiv) To the extent portions of source code are quoted in a Source Code
 17 Document, either (1) the entire document will be stamped CONFIDENTIAL SOURCE
 18 CODE or (2) those pages containing quoted source code will be separately bound, and
 19 stamped as CONFIDENTIAL SOURCE CODE. All Source Code Documents shall
 20 also be marked with the legend "CONFIDENTIAL BUSINESS INFORMATION,
 21 SUBJECT TO PROTECTIVE ORDER," or a comparable notice, and shall be treated as
 22 Confidential Business Information pursuant to this Protective Order.

23 (xv) All paper copies of source code shall be securely destroyed if they are
 24 no longer necessary in the litigation (*e.g.*, extra copies at the conclusion of a
 25 deposition). Copies of source code that are marked as deposition exhibits shall not be

provided to the court reporter or attached to deposition transcripts; rather, the deposition record will identify the exhibit by its production numbers.

(xvi) The receiving party may not create electronic images, or any other images, of the source code from the paper copy for use on a computer (*e.g.*, may not scan the source code to a PDF, or photograph the code). The receiving party may create an electronic copy or image of selected portions of the source code only when reasonably necessary to accomplish any filing with the Court or to serve any pleadings or other papers on any other party (including expert reports). Images or copies of source code shall not be included in correspondence between the parties (references to production numbers shall be used instead) and shall be omitted from pleadings and other papers except to the extent permitted herein.

25. Unless otherwise ordered by the Court, Confidential Source Code designated as “CONFIDENTIAL SOURCE CODE” shall be subject to the provisions set forth in paragraphs 21 to 26 and may be disclosed, subject to paragraphs 21 to 26, solely to:

(a) outside counsel representing the parties to this action, as defined in paragraph 3(i), including necessary secretarial and support personnel regularly employed by and assisting such counsel, except that, unless otherwise agreed, no outside counsel who is involved in competitive decision-making, as defined by *U.S. Steel v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984), shall have access to Confidential Source Code designated as “CONFIDENTIAL SOURCE CODE;”

(b) any outside expert or consultant retained by a party for the purposes of this action and who satisfies paragraph 3(iii) of this Order, provided that disclosure is only to the extent necessary to perform such work; and provided that:

(i) such expert or consultant has agreed to be bound by the provisions of this Order as required by paragraphs 3, 4, and 11 of this Order,

(ii) such expert or consultant is not involved in competitive decision-making, as defined by *U.S. Steel v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984), on behalf of a party or a competitor of a party in the technical subject matter of the Confidential Business Information produced, and

(iii) no unresolved objections to such disclosure exist after proper notice has been given to all parties as set forth in paragraphs 3, 4, and 11 of this Order;

(c) court reporters, stenographers, and videographers retained to record testimony taken in this action, provided that such court reporters, stenographers, and videographers have agreed to be bound by the provisions of this Order as required by paragraph 4 of this Order;

(d) the Court;

(e) any persons who are witnesses during a deposition, court hearing, or trial where specific documentary or testimonial evidence establishes at that time that the Confidential Source Code or portion of the Confidential Source Code was authored or received by the witness without any violation of any confidentiality obligation owed to any party in this action;

(f) any mediator who is assigned to hear this matter, and his or her staff, subject to their agreement to maintain confidentiality to the same degree as required by this Order;

(g) any other person with the prior written consent of the supplier.

26. Access to and review of the Confidential Source Code shall be strictly for the purpose of investigating the claims and defenses at issue in this action. No person shall review or analyze any Confidential Source Code for purposes unrelated to this action, nor may any

1 person use any knowledge gained as a result of reviewing Confidential Source Code in this
2 action in any other pending or future dispute, proceeding, patent prosecution, or litigation.
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1 **AGREED AND STIPULATED TO:**

2
3 CALFO HARRIGAN LEYH & EAKES LLP

SUMMIT LAW GROUP PLLC

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6 Christopher Wion, WSBA #33207
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**Attorneys for Defendants Motorola
Solutions, Inc., Motorola Mobility, Inc.**

Counsel for Plaintiff Microsoft Corp.

ORDER

As stipulated above, IT IS SO ORDERED.

DATED this ____ day of _____, 2012.

THE HONORABLE JAMES L. ROBART

EXHIBIT B

HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,
Plaintiff,

vs.

MOTOROLA, INC., et al.,
Defendants.

MOTOROLA MOBILITY, INC., et al.,
Plaintiffs,

vs.

MICROSOFT CORPORATION,
Defendants.

Case No. C10-1823-JLR

**AMENDED PROTECTIVE ORDER
REGARDING THE DISCLOSURE
AND USE OF DISCOVERY
MATERIALS**

Microsoft Corporation (“Microsoft”) and Motorola, Inc., Motorola Mobility, Inc., and General Instrument Corporation (collectively “Motorola”) hereby stipulate that this protective order should be entered and will govern the conduct of discovery in this case.

1. Confidential Business Information is information which has not been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of

1 customers, inventories, amount or source of any income, profits, losses, or expenditures of any
2 person, firm, partnership, corporation, or other organization, the disclosure of which
3 information is likely to have the effect of causing substantial harm to the competitive position
4 of the person, firm, partnership, corporation, or other organization from which the information
5 was obtained, unless the Court is required by law to disclose such information.

6 2. (a) Any information submitted in pre-trial discovery or in a pleading,
7 motion, or response to a motion in this action, either voluntarily or pursuant to order, and
8 which is asserted by a supplier to contain or constitute Confidential Business Information shall
9 be so designated by such supplier in writing, or orally at a deposition, conference, or hearing,
10 and shall be segregated from other information being submitted. Documents shall be clearly
11 and prominently marked on their face with the legend: “[SUPPLIER’S NAME]
12 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER” or a
13 comparable notice. During the pre-trial phase of this action, such information, whether
14 submitted in writing or in oral testimony, shall be disclosed only *in camera* before the Court
15 and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules of the United
16 States District Court for the Western District of Washington.

17 (b) The Court may determine that information alleged to be confidential is
18 not confidential, or that its disclosure is necessary for the proper disposition of the proceeding
19 before, during, or after the close of the action herein. If such a determination is made by the
20 Court, opportunity shall be provided to the supplier of such information to argue its
21 confidentiality prior to the time of such ruling.

22 3. In the absence of written permission from the supplier or an order from the
23 Court, any confidential documents or business information submitted in accordance with the
24 provisions of paragraph 2 above shall not be disclosed to any person other than:
25

1 (i) outside counsel for parties to this action, including necessary secretarial
2 and support personnel assisting such counsel;

3 (ii) qualified persons taking testimony involving such documents or
4 information and necessary stenographic and clerical personnel thereof;

5 (iii) technical experts and their staff who are employed for the purposes of
6 this litigation;

7 (iv) T. Andrew Culbert (for Microsoft) and K. McNeill Taylor (for
8 Motorola); and

9 (iv) the Court.

10 4. Confidential Business Information submitted in accordance with the provisions
11 of paragraph 2 above shall not be made available to any person designated in paragraph 3(iii)-
12 (iv) unless he or she shall have first read this order and shall have signed a writing substantially
13 provided as Attachment A hereto, a copy of which shall be provided to both parties,
14 manifesting agreement:

15 (i) to be bound by the terms thereof;

16 (ii) not to reveal such Confidential Business Information to anyone other
17 than another person designated in paragraph 3; and

18 (iii) to utilize such Confidential Business Information solely for purposes of
19 this action.

20 5. If the Court orders, or if the supplier and all parties to the action agree, that
21 access to or dissemination of information submitted as Confidential Business Information shall
22 be made to persons not included in paragraph 3 above, such matter shall only be accessible to
23 or disseminated to such persons based upon the conditions pertaining to, and obligations
24 arising from this order, and such persons shall be considered subject to it, unless the Court
25

1 finds that the information is not Confidential Business Information as defined in paragraph 1
2 hereof.

3 6. In addition to the persons included in paragraph 3 above, Confidential Business
4 Information contained in responses to interrogatories, answers to requests for admission,
5 submissions to the Court, expert reports (exclusive of exhibits and source code excerpts),
6 opinions and orders of the Court may be accessible to or disseminated to the following two in-
7 house counsel, who are members of at least one state bar in good standing, with direct
8 responsibility for managing this litigation:

9 (a) for Motorola, Tom Miller and Richard A. Wulff;

10 (b) for Microsoft, ~~T. Andrew Culbert~~ and David E. Killough.

11 provided that (1) Confidential Business Information pertaining to licensing or other
12 commercially sensitive financial information shall not be made available under this paragraph
13 6 to such designated in-house counsel; the supplier shall designate such Confidential Business
14 Information pertaining to licensing or other commercially sensitive financial information as
15 “[SUPPLIER’S NAME] CONFIDENTIAL FINANCIAL INFORMATION – OUTSIDE
16 ATTORNEYS’ EYES ONLY – SUBJECT TO PROTECTIVE ORDER” and promptly provide
17 a redacted version of such document that may be disseminated to the ~~two~~ in-house counsel
18 designated under this paragraph 6; and (2) such in-house counsel shall have first read this order
19 and shall have signed a writing substantially provided as Attachment A hereto, a copy of which
20 shall be provided to both parties, manifesting agreement:

21 (i) to be bound by the terms thereof;

22 (ii) not to reveal such Confidential Business Information to anyone other
23 than another person designated in paragraph 3; and

24 (iii) to utilize such Confidential Business Information solely for purposes of
25 this action.

1 7. Subject to the restrictions of paragraph 6 above, the two in-house counsel
2 designated therein shall not be excluded from any confidential portion of the trial or other in-
3 Court proceedings in this case.

4 8. Any Confidential Business Information submitted to the Court in connection
5 with a motion or other proceeding within the purview of this action shall be submitted under
6 seal pursuant to paragraph 2 above. Any portion of a transcript in connection with this action
7 containing any Confidential Business Information submitted pursuant to paragraph 2 above
8 shall be bound separately and filed under seal. When any Confidential Business Information
9 submitted in accordance with paragraph 2 above is included in an authorized transcript of a
10 deposition or exhibits thereto, arrangements shall be made with the court reporter taking the
11 deposition to bind such confidential portions and separately label them [SUPPLIER'S NAME],
12 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER.

13 Before a court reporter receives any such information, he or she shall have first read this order
14 and shall have agreed in writing to be bound by the terms thereof. Alternatively, he or she
15 shall sign the agreement included as Attachment B hereto. Copies of each such signed
16 agreement shall be provided to the supplier of such Confidential Business Information.

17 9. The restrictions upon, and obligations accruing to, persons who become subject
18 to this order shall not apply to any information submitted in accordance with paragraph 2
19 above to which the person asserting the confidential status thereof agrees in writing, or the
20 Court rules after an opportunity for hearing, that the information was publicly known at the
21 time it was supplied to the receiving party or has since become publicly known through no
22 fault of the receiving party.

23 10. If while this action is before the Court, a party to this order who is to be a
24 recipient of any business information designated as confidential and submitted in accordance
25 with paragraph 2 disagrees with respect to such a designation, in full or in part, it shall notify

1 the supplier in writing and they will thereupon confer as to the status of the subject information
2 proffered within the context of this order. If prior to or at the time of such a conference, the
3 supplier withdraws its designation of such information as being subject to this order, but
4 nonetheless submits such information for purposes of the action, such supplier shall express the
5 withdrawal in writing, and serve such withdrawal upon all parties. If the recipient and supplier
6 are unable to concur upon the status of the subject information submitted as Confidential
7 Business Information within ten days from the date of notification of such disagreement, any
8 party to this order may raise the issue of the designation of such a status to the Court who will
9 rule upon the matter. The Court may *sua sponte* question the designation of the confidential
10 status of any information and, after opportunity for hearing, may remove the confidentiality
11 designation.

12 11. No less than 10 days (or any other period of time designated by the Court) prior
13 to the initial disclosure to a proposed expert of any confidential information submitted in
14 accordance with paragraph 2, the party proposing to use such expert shall submit in writing the
15 name of such proposed expert and his or her educational and employment history to the
16 supplier. If the supplier objects to the disclosure of such Confidential Business Information to
17 such proposed expert as inconsistent with the language or intent of this order or on other
18 grounds, it shall notify the recipient in writing of its objection and the grounds therefor prior to
19 the initial disclosure. If the dispute is not resolved on an informal basis within ten days of
20 receipt of such notice of objection, the supplier shall submit immediately each objection to the
21 Court for a ruling. The submission of such Confidential Business Information to such
22 proposed expert shall be withheld pending the ruling of the Court.

23 12. If Confidential Business Information submitted in accordance with paragraph 2
24 is disclosed to any person other than in the manner authorized by this protective order, the
25 party responsible for the disclosure must immediately bring all pertinent facts relating to such

1 disclosure to the attention of the supplier and the Court and, without prejudice to other rights
2 and remedies of the supplier, make every effort to prevent further disclosure by it or by the
3 person who was the recipient of such information.

4 13. Nothing in this order shall abridge the right of any person to seek judicial
5 review or to pursue other appropriate judicial action with respect to any ruling made by the
6 Court concerning the issue of the status of Confidential Business Information.

7 14. Upon final termination of this action, each party that is subject to this order
8 shall assemble and return to the supplier all items containing Confidential Business
9 Information submitted in accordance with paragraph 2 above, including all copies of such
10 matter which may have been made. Alternatively, the parties subject to this order may, with
11 the written consent of the supplier, destroy all items containing Confidential Business
12 Information and certify to the supplier (or his counsel) that such destruction has taken place.

13 15. If any Confidential Business Information which is supplied in accordance with
14 paragraph 2 above is supplied by a nonparty to this action, such a nonparty shall be considered
15 a "supplier" as that term is used in the context of this order.

16 16. Each nonparty supplier shall be provided a copy of this order by the party
17 seeking information from said supplier.

18 17. The inadvertent production of any document or information (whether
19 designated as Confidential Business Information or not) shall not be deemed to waive any
20 attorney-client privilege, work product protection, or other privilege or immunity that would
21 otherwise attach to the document or information produced, or to other documents or
22 information, so long as the procedures of paragraphs 18 and 19 below are followed.

23 18. If a producing party or person discovers that a privileged, protected, or
24 otherwise immune document or information has been produced, the party or person must,
25 promptly after discovery, notify all other party or parties of the claim of privilege or other

1 protection or immunity. Upon such notice, each other party shall use its best efforts to retrieve
2 the original and all copies of the identified document or information of which the party is
3 aware, shall promptly destroy all such copies of the identified document or information, and
4 shall notify the producing party in writing that it has done so within ten (10) calendar days of
5 receiving such notice. Such destruction shall not constitute an acknowledgement that the
6 identified document or information is, in fact, privileged or entitled to protection or immunity
7 and shall not preclude any party from later moving the Court to compel the production of the
8 identified document or information. Within a reasonable time after notifying the other party or
9 parties of a claim of privilege or other protection or immunity, the Producing Party shall
10 provide a privilege log for those materials.

11 19. If a receiving party receives any document or information that appears to be
12 subject to an attorney-client privilege, work product protection, or other privilege or immunity
13 that would otherwise attach to the document or information, and where it is reasonably
14 apparent that the document or information was provided or made available through
15 inadvertence, the receiving party must refrain from examining the document or information
16 any more than is essential to ascertain whether the document or information is likely
17 privileged, protected, or otherwise immune, and shall immediately notify the producing party
18 in writing that the receiving party possesses material that appears to be privileged, protected, or
19 otherwise immune. The procedures of paragraph 18 shall then apply.

20 20. The parties have agreed to follow the provisions of Fed. R. Civ. P. 26(b)(4)(B)-
21 (D), as amended effective December 1, 2010, with respect to the protection of draft expert
22 reports and communications between a party's attorney(s) and an expert(s). In addition, the
23 parties have agreed that notes taken by the parties' experts in the course of the preparation of
24 their reports, drafts of the expert reports, and all communications between counsel for the
25 parties and their experts (including, but not limited to, emails and other written

1 correspondence) (all of the foregoing hereinafter referred to as “Expert Work Product”) need
2 not be retained and shall be not produced in this or any other action. Expert Work Product
3 shall not include communications, information and things that are relied upon by the expert in
4 his or her opinions, or which otherwise form the basis of the expert’s report. Neither the terms
5 of this paragraph nor the parties’ agreement to them implies that any of the information
6 restricted from discovery in this paragraph would otherwise be discoverable.

7 21. Confidential Source Code shall mean human-readable programming language
8 text that defines software, firmware, or electronic hardware descriptions. Confidential Source
9 Code includes, without limitation, computer code; scripts; assembly; object code; source code
10 listings and descriptions of source code; object code listings and descriptions of object code;
11 Hardware Description Language (HDL); Register Transfer Level (RTL) files that describe the
12 hardware design of any ASIC or other chip; similarly sensitive implementation details; files
13 containing text written in “C,” “C++,” assembler, VHDL, Verilog, and digital signal processor
14 (DSP) programming languages; “.include files;” “make” files; link files; and other human-
15 readable text files used in the generation and/or building of software directly executed on a
16 microprocessor, microcontroller, or DSP. Confidential Source Code is a form of, and shall be
17 afforded all of the same protections as, Confidential Business Information as defined in
18 paragraph 1 hereto unless otherwise provided in paragraphs 21 to 26. The restrictions herein
19 on Confidential Source Code do not apply to publicly-available source code available as open
20 source code.

21 22. To the extent that a party wishes to obtain access to Confidential Source Code,
22 the following procedures may apply at the option of the supplier. Nothing in this Order shall
23 be construed as a representation or admission by a party that Confidential Source Code is
24 properly discoverable in this action, or to obligate any party to produce Confidential Source
25 Code.

23. Documents or things that comprise a party's confidential, proprietary and/or trade secret source code or object code may be designated CONFIDENTIAL SOURCE CODE. Documents or things that include or are accompanied by confidential, proprietary and/or trade secret source code or object code may be designated CONFIDENTIAL SOURCE CODE only if such confidential, proprietary and/or trade secret source code or object code cannot reasonably be segregated from the document or thing. The following conditions shall govern the production, review and use of documents or things designated CONFIDENTIAL SOURCE CODE.

24. All information designated as CONFIDENTIAL SOURCE CODE shall be subject to the following provisions:

(i) Subject to the following notice provisions and each producing party's written objections, each producing party shall make its responsive CONFIDENTIAL SOURCE CODE continuously available for inspection during discovery and through the conclusion of the trial in this action. Any single reviewing session (conducted during one business day or during consecutive business days of review) shall be conducted during regular business hours (9:00 A.M. to 6:00 P.M. local time) on four (4) calendar days' written (including email) notice, or during such other hours as may be mutually and reasonably agreed upon on reasonable notice.

(ii) A list of names of persons who will view the source code will be provided to the producing party in conjunction with the written notice requesting inspection. The receiving party shall maintain a daily log of the names of persons who enter the source code viewing room (see paragraph 24(iv) below) to view the source code and note on the log when these persons enter and depart. The producing party shall be entitled to have a person observe all entrances and exits from the source code

1 viewing room, and to receive a copy of the log, but shall not otherwise be entitled to
2 observe the receiving party's inspection.

3 (iii) All source code produced pursuant to these provisions will be made
4 available by the producing party at the following locations:

- 5 • By Motorola, at the offices of Ropes & Gray LLP, 111 South Wacker Drive,
46th Floor, Chicago, Illinois 60606;
- 6 • By Microsoft, at the offices of Sidley Austin LLP, 1501 K Street NW,
7 Washington, DC 20005; and
- 8 • By third parties, at such location(s) as may be mutually agreed to by the
9 producing third party and the requesting party, or as otherwise ordered by the
10 Court.

11 (iv) All source code will be made available in a private room, on a secured
12 computer without Internet access or network access to other computers, as necessary
13 and appropriate to prevent and protect against any unauthorized copying, transmission,
14 removal, or other transfer of any source code outside or away from the computer on
15 which the source code is provided for inspection (the "Source Code Computer"). The
16 producing party shall be obligated to install such reasonable tools or programs
17 necessary to review and search the code produced on the platform produced, as
18 specified by the receiving party, which the receiving party may provide if the producing
19 party does not have. For example, prior to the date of the inspection, a text editor or
20 IDE capable of performing syntax highlighting should be installed on the Source Code
21 Computer. The producing party shall not be obligated to install tools or programs
22 capable of compiling and running source code. To the extent the receiving party
23 provides the producing party with tools or programs to install for use during a
24 reviewing session, any such tools or programs must be provided no later than five (5)
25 business days in advance of the first reviewing session for which such installation is

1 desired. Thereafter, such tools or programs shall remain on the Source Code Computer
2 throughout the discovery period, absent agreement to the contrary.

3 (v) The receiving party's outside counsel and/or technical advisers shall be
4 entitled to take notes relating to the source code but may not copy the source code into
5 the notes. Such notes shall be subject to the provisions of paragraph 24(x) below. No
6 copies of all or any portion of the source code may leave the room in which the source
7 code is inspected. Furthermore, no other written or electronic record of the source code
8 is permitted except as otherwise provided herein.

9 (vi) During inspection of the code, the receiving party may compile a list of
10 source code files to be produced. The receiving party will only identify such files as
11 are reasonably necessary to facilitate the receiving party's preparation of the case,
12 including (1) when reasonably necessary to prepare any filing with the Court or to serve
13 any pleadings or other papers on any other party, (2) to prepare internal attorney work
14 product materials, (3) or to prepare other necessary case materials such as testifying
15 expert reports, consulting expert written analyses, and related drafts and
16 correspondences. In no event may the receiving party identify more than those files
17 necessary to analyze the issues in this case during the duration of the case without prior
18 written approval by the producing party. Upon identification of such files by the
19 receiving party, the producing party shall print, append production numbers to, and
20 label such files with the file's complete file path (*e.g.*, ./product1/source/main/
21 test/test.h) and the designation CONFIDENTIAL SOURCE CODE. If the producing
22 party objects that identified files are not reasonably necessary to any case preparation
23 activity, the producing party shall make such objection known to the receiving party
24 within five (5) business days of the identification of any files by the receiving party. If,
25 after meeting and conferring, the producing party and the receiving party cannot

1 resolve the objection, the producing party shall be entitled to seek a judicial resolution
2 of whether or not the identified source code in question is reasonably necessary to any
3 case preparation activity. In the absence of any objection, or upon resolution of any
4 such dispute by the Court, the producing party shall provide one printed copy of the
5 identified files to the receiving party within five (5) business days of the identification
6 of such files by the receiving party or, if applicable, resolution of a dispute by the
7 Court. The printed pages shall constitute part of the source code produced by the
8 producing party in this action.

9 (vii) Unless otherwise agreed in advance by the parties in writing, following
10 each reviewing session (conducted during one business day or during consecutive
11 business days of review), the receiving party's outside counsel and/or technical advisers
12 shall remove all notes, documents, laptops, and all other materials from the room that
13 may contain work product and/or attorney-client privileged information. The
14 producing party shall not be responsible for any items left in the room following each
15 inspection session.

16 (viii) The receiving party will not copy, remove, or otherwise transfer any
17 source code from the Source Code Computer including, without limitation, copying,
18 removing, or transferring the source code onto any other computers or peripheral
19 equipment. The receiving party will not transmit any source code in any way from the
20 producing party's facilities or the offices of its outside counsel of record.

21 (ix) Documents designated CONFIDENTIAL SOURCE CODE may only be
22 viewed by or disclosed to outside counsel or the receiving party's technical advisers
23 approved by the producing party and their necessary support personnel. The term
24 "technical adviser" shall mean an independent, outside expert witness or consultant
25 with whom counsel may deem it appropriate to consult, subject to the following

1 provision. Documents designated CONFIDENTIAL SOURCE CODE may not be
2 disclosed to in-house counsel.

3 (x) A party desiring to disclose information to a technical adviser shall give
4 prior written notice to the producing party or non-party, who shall have ten (10)
5 business days after such notice is given to object in writing. A party desiring to
6 disclose CONFIDENTIAL SOURCE CODE information to a technical adviser must
7 provide the following information for each technical adviser: (i) name, address,
8 curriculum vitae, current employer, and employment (including consulting) history for
9 the past four (4) years; and (ii) a listing of cases in which the witness has testified as an
10 expert at trial or by deposition within the preceding four years. No CONFIDENTIAL
11 SOURCE CODE information shall be disclosed to such expert(s) or consultant(s) until
12 after the expiration of the foregoing notice period.

13 (xi) The outside counsel and technical advisers (who have been approved to
14 access source code under paragraphs 24(ix) and 24(x) above) for a receiving party shall
15 maintain and store any paper copies of the source code or notes related to such source
16 code (as referenced in paragraphs 24(v) and 24(vi)) at their offices in a manner that
17 prevents duplication of or unauthorized access to the source code or notes, including,
18 without limitation, storing the source code or notes in a locked room or cabinet at all
19 times when those materials are not in use;

20 (xii) The receiving party's outside counsel of record may make no more than
21 five additional paper copies of any portions of the source code files identified pursuant
22 to paragraph 24(vi), not including copies attached to court filings, and shall maintain a
23 log of all copies of the source code (received from a producing party) that are provided
24 by the receiving party to any qualified person. The log shall include the names of the
25 recipients and reviewers of copies and locations where the copies are stored. Any

1 paper copies of source code shall be designated CONFIDENTIAL SOURCE CODE –
2 and shall be stored or viewed only at (1) the offices of outside counsel for the receiving
3 party, (2) the offices of technical advisers who have been approved to access source
4 code under paragraphs 24(ix) and 24(x), (3) the site where any deposition is taken,
5 (4) the Court, or (5) any intermediate location necessary to transport the information to
6 a hearing, trial, or deposition. Any such paper copies shall be maintained at all times in
7 a locked and secure location. The producing party shall not unreasonably deny a
8 receiving party's request to make (and log) additional copies, providing that the request
9 is for good cause and for use that otherwise complies with this order. The producing
10 party shall be entitled to a copy of the log upon request, and at the conclusion of the
11 litigation.

12 (xiii) The receiving party may include excerpts of source code in a pleading,
13 exhibit, expert report, discovery document, deposition transcript, other Court document,
14 or any drafts of these documents ("Source Code Documents"). The receiving party
15 shall only include such excerpts as are reasonably necessary for the purposes for which
16 such part of the source code is used — as an example, excerpts of approximately 25 to
17 40 lines in length are presumptively reasonable.

18 (xiv) To the extent portions of source code are quoted in a Source Code
19 Document, either (1) the entire document will be stamped CONFIDENTIAL SOURCE
20 CODE or (2) those pages containing quoted source code will be separately bound, and
21 stamped as CONFIDENTIAL SOURCE CODE. All Source Code Documents shall
22 also be marked with the legend "CONFIDENTIAL BUSINESS INFORMATION,
23 SUBJECT TO PROTECTIVE ORDER," or a comparable notice, and shall be treated as
24 Confidential Business Information pursuant to this Protective Order.
25

(xv) All paper copies of source code shall be securely destroyed if they are no longer necessary in the litigation (*e.g.*, extra copies at the conclusion of a deposition). Copies of source code that are marked as deposition exhibits shall not be provided to the court reporter or attached to deposition transcripts; rather, the deposition record will identify the exhibit by its production numbers.

(xvi) The receiving party may not create electronic images, or any other images, of the source code from the paper copy for use on a computer (*e.g.*, may not scan the source code to a PDF, or photograph the code). The receiving party may create an electronic copy or image of selected portions of the source code only when reasonably necessary to accomplish any filing with the Court or to serve any pleadings or other papers on any other party (including expert reports). Images or copies of source code shall not be included in correspondence between the parties (references to production numbers shall be used instead) and shall be omitted from pleadings and other papers except to the extent permitted herein.

25. Unless otherwise ordered by the Court, Confidential Source Code designated as “CONFIDENTIAL SOURCE CODE” shall be subject to the provisions set forth in paragraphs 21 to 26 and may be disclosed, subject to paragraphs 21 to 26, solely to:

(a) outside counsel representing the parties to this action, as defined in paragraph 3(i), including necessary secretarial and support personnel regularly employed by and assisting such counsel, except that, unless otherwise agreed, no outside counsel who is involved in competitive decision-making, as defined by *U.S. Steel v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984), shall have access to Confidential Source Code designated as “CONFIDENTIAL SOURCE CODE;”

1 (b) any outside expert or consultant retained by a party for the purposes of
2 this action and who satisfies paragraph 3(iii) of this Order, provided that disclosure is only to
3 the extent necessary to perform such work; and provided that:

4 (i) such expert or consultant has agreed to be bound by the
5 provisions of this Order as required by paragraphs 3, 4, and 11 of this Order,

6 (ii) such expert or consultant is not involved in competitive
7 decision-making, as defined by *U.S. Steel v. United States*, 730 F.2d 1465, 1468
8 n.3 (Fed. Cir. 1984), on behalf of a party or a competitor of a party in the
9 technical subject matter of the Confidential Business Information produced, and

10 (iii) no unresolved objections to such disclosure exist after proper
11 notice has been given to all parties as set forth in paragraphs 3, 4, and 11 of this
12 Order;

13 (c) court reporters, stenographers, and videographers retained to record
14 testimony taken in this action, provided that such court reporters, stenographers, and
15 videographers have agreed to be bound by the provisions of this Order as required by
16 paragraph 4 of this Order;

17 (d) the Court;

18 (e) any persons who are witnesses during a deposition, court hearing, or
19 trial where specific documentary or testimonial evidence establishes at that time that the
20 Confidential Source Code or portion of the Confidential Source Code was authored or received
21 by the witness without any violation of any confidentiality obligation owed to any party in this
22 action;

23 (f) any mediator who is assigned to hear this matter, and his or her staff,
24 subject to their agreement to maintain confidentiality to the same degree as required by this
25 Order;

1 (g) any other person with the prior written consent of the supplier.

2 26. Access to and review of the Confidential Source Code shall be strictly for the
3 purpose of investigating the claims and defenses at issue in this action. No person shall review
4 or analyze any Confidential Source Code for purposes unrelated to this action, nor may any
5 person use any knowledge gained as a result of reviewing Confidential Source Code in this
6 action in any other pending or future dispute, proceeding, patent prosecution, or litigation.
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1 **AGREED AND STIPULATED TO:**

2
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24 **Counsel for Plaintiff Microsoft Corp.**

ORDER

As stipulated above, IT IS SO ORDERED.

DATED this ____ day of _____, 2012.

THE HONORABLE JAMES L. ROBART